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SUPREME COURT, U.S.
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IN THE

Supreme Court of the United States

October Term, 1972

No. 72-186

ANDREW MUNCHAK, JR.,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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INDEX

PAGE

The Opinions Below 1

Jurisdiction 2

Questions Presented 2

Constitutional Provisions Involved 3

Statement of the Case 3

The Reasons for Granting the Writ 14

I. Suppression and Taint 14

II. The Necessity for a Hearing 20

III. The Denial of Effective Assistance of Counsel 23

Conclusion 27

Appendix A 1a

Appendix B 4a

Appendix C 7a

Table of Authorities

Cases:

Alcorta v. *Texas*, 355 U.S. 28 (1957) 21

Barbee v. *Warden*, 331 F.2d 842 (4 Cir. 1964) 16, 25

Brady v. *Maryland*, 373 U.S. 83 (1963) 14, 17

PAGE

Chapman v. *California*, 386 U.S. 18, 22, 24 (1967) 20
Communist Party v. *Subversive Activities Control Board*, 351 U.S. 115, 124 (1956) 15

Giglio v. *United States*, 405 U.S. 150 (1972) 14, 17, 21
Giles v. *Maryland*, 386 U.S. 66, 96 (1967) 18
Griffin v. *United States*, 336 U.S. 704, 708-9 (1949) 19

Jackson v. *Wainwright*, 390 F.2d 288 (5 Cir. 1968) 25

Kolod v. *United States*, 390 U.S. 136 (1968) 21

Lee v. *United States*, 388 F.2d 737 (9 Cir. 1969) 22
Levin v. *Katzenbach*, 363 F.2d 287 (D.C. Cir. 1966) 25, 26

Mesarosh v. *United States*, 352 U.S. 1, 12 (1956) 14, 15, 19
Miller v. *Plate*, 386 U.S. 1, 4 (1967) 18, 21
Mooney v. *Holohan*, 294 U.S. 103 (1935) 22
Moore v. *Illinois* (No. 69—5001), —— U.S. —— (1972) 15, 16, 21

Napue v. *Illinois*, 360 U.S. 264 (1959) 14, 21

Pyle v. *Kansas*, 317 U.S. 213 (1942) 22

United States v. *Munchak*, 443 F.2d 531 (2d Cir. 1971) 7
U.S. v. *Bryant*. 439 F.2d 642 (D.C. Cir. 1971) 16, 22
U.S. ex rel. Raymond v. *Illinois*, 455 F.2d 62 (7 Cir. 1971) 20, 23, 25
U.S. ex rel. Thompson v. *Dye*, 208 F.2d 565 (3 Cir. 1953) 22
U.S. v. *Johnson*, 327 U.S. 106 (1946) 17
U.S. v. *Poole*, 379 F.2d 645 (7 Cir. 1967) 25

Other authorities:

PAGE

28 U.S.C. §1254 (1) 2

8A Moore's Federal Practice ¶33.03[3] (2d Ed. 1970) .. 21

8A Moore's Federal Practice ¶16.06[1] (2d Ed. 1970) .. 26

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Petitioner, Andrew Munchak, Jr., prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on June 15, 1972.

The Opinions Below

The Court of Appeals affirmed the District Court's denial of petitioner's motion for a new trial. The decision of the Court of Appeals, not yet reported, was rendered *per curiam* and appears in Appendix A hereto. It was rendered on the opinion of the United States District Court for the Southern District of New York (Hon. Edward Weinfeld, J.), which is reported at 338 F. Supp. 1283 (S.D.N.Y. 1972) and appears in Appendix C hereto.

Jurisdiction

This petition was filed within 60 days of the entry of the judgment of the Court of Appeals, pursuant to an order of Mr. Justice Marshall, dated July 7, 1972, extending the time for filing the petition to and including August 14, 1972. This Court's jurisdiction to review the judgment below is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. Was petitioner, who stands convicted in a federal court, denied due process by the government's suppression of material evidence repeatedly requested by the defense, both prior to and at trial, and by the government's failure to correct false testimony given at trial by two of its witnesses, knowledge of the falsity of which is chargeable to it?

2. Was petitioner denied due process by reason of the rejection of his claims of suppression and taint without an evidentiary hearing and without any showing having been made by the government with respect to the conduct of its representatives?

3. Was petitioner denied the effective assistance of counsel by reason of the government's suppression of material evidence requested by the defense and the stringent standard of due diligence applied by the court below in passing on petitioner's motion for a new trial?

4. May a defendant convicted in a federal court be denied a new trial on the basis of the failure of his counsel to exercise due diligence in discovering material evidence, where there is no showing by the government that such failure to exercise due diligence, if it occurred, was caused, contributed to, or known to the defendant in any way?

Constitutional Provisions Involved

Fifth Amendment to the Constitution of the United States:

> "No person shall be . . . deprived of life, liberty, or property, without due process of law. . . ."

Sixth Amendment to the Constitution of the United States:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."

Statement of the Case

Petitioner stands convicted of one of four counts of mail fraud under 18 U.S.C. § 1341. Two counts were dismissed by the trial court at the close of the government's case. Two counts, relating to allegedly misbranded RCA transistors, went to the jury, which acquitted on one and convicted on the other.

To the extent relevant here, the indictment charged that the petitioner made false representations with respect to allegedly misbranded RCA transistors sold by him, including that they "were manufactured by firms which did not manufacture them", "were newer than they in fact were" and "were of higher quality than was in fact the case" (6A).* The misrepresentations alleged thus related to three matters—identity of manufacturer, age and quality.**

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* The court below had before it a Joint Appendix and a Joint Supplemental Appendix. "A" references are to pages of the former and "B" references are to pages of the latter.

** A fourth misrepresentation charged related to the containers in which the transistors were shipped, but it is uncontested that the government presented no evidence to support this charge.

With respect to the one count on which the petitioner stands convicted, the government's key witness was Alfred G. Kick, Chief Security Officer of RCA. But Kick's role went far beyond that of a mere witness. He was actively utilized by the government to assist in the preparation and presentation of its case against petitioner. This was revealed for the first time in an affidavit submitted by Kick in response to petitioner's motion for a new trial. By his own admission, never contradicted by the government, Kick "assisted Inspector Palmer and Assistant United States Attorney Richard Givens on this investigation" (40B).*

Kick testified both before the grand jury and at trial. His grand jury testimony included the following, in response to questioning by Mr. Givens:

"Q. Did you run any tests on components with this stamp on it, which was not an RCA stamp such as you have been shown? By 'you', I mean RCA.

"A. RCA did, I did not. *I had asked the factory engineers to make some tests on those units to see whether they measured up to our specifications.*

"Q. Did they?

"A. *No, sir*" (Emphasis supplied) (14B).

Promptly after petitioner's indictment, petitioner's counsel made a motion seeking production, *inter alia*, of "all reports of scientific tests . . . in connection with this case and the tangible evidence which has been subjected to testing" (12B). In an affidavit submitted by Mr. Givens, the

* Mr. Givens presented the matter to the grand jury. A different Assistant United States Attorney, Mr. Sullivan, represented the government at trial. Postal Inspector Walter Palmer played a major role in the investigation leading to petitioner's indictment.

government consented to the motion to the extent that the items requested were available to the government (12B; Givens Affid., 3/6/69, pp. 2, 3).

To implement the discovery sought by petitioner and consented to by the government, the government and the defense arranged a meeting at the United States Post Office at Eighth Avenue and 33rd Street in New York City. On September 30, 1969, petitioner and his counsel went there and met with Postal Inspector Palmer, Kick of RCA, and two representatives of Texas Instruments, whose transistors were the subject of the two counts dismissed by the trial court. It was Inspector Palmer who arranged for Kick to be present.

In response to the request of petitioner's counsel regarding the results of tests, which request was again repeated at this meeting, reports of tests were disclosed only by representatives of Texas Instruments. None were disclosed by Kick or Inspector Palmer and neither of them made any disclosure regarding the making or the results of tests by RCA, notwithstanding Kick's previous representation to the grand jury (unknown to the defense) that RCA had conducted tests, the results of which, the grand jury had been told, supposedly established that the transistors sold by petitioner failed to meet RCA specifications (53B-54B).*

Thus, during the entire period between petitioner's indictment and trial the existence and results of tests conducted by RCA were withheld from the defense notwithstanding the government's treatment of these matters in

* The Texas Instruments tests, whose results were disclosed, were adverse to the defense on their face. Thus, it would not appear that the government's failure to disclose the RCA tests can be explained on the basis that the results of those tests were believed to be adverse to the defense, as the opinion below suggests. Also, as will be pointed out, the results of the RCA tests were ultimately found to have been favorable to the defense, not adverse.

testimony before the grand jury and the prompt request for disclosure by the defense—a request to which the government stated it consented.

At the end of his cross-examination at trial, Kick testified as follows:

"Q. You have told his Honor and the jury about your activities in connection with this investigation and the preparation of various photographs which had been shown to you.

"Will you tell his honor and the jury whether RCA ran or conducted any tests on these allegedly non-RCA components, indicating Government's Exhibits 3A through 3 'i'?

"A. *There were no tests made on these Exhibits 3A through 'i'"* (Emphasis supplied) (368A-369A).*

At the end of the government's direct case, petitioner's counsel requested that the government furnish to the defense the results of any tests favorable to the defense which might have been made by RCA. Counsel stated: "There seems to be an indication from Mr. Kick they [tests] were [made]" (382A).** He also specifically called to the court's attention the fact that the defense had made a request for disclosure of tests months before in a pretrial motion (383A). In response to this request, the prosecutor, Mr. Sullivan, stated in substance that the government had no knowledge of any such tests conducted by RCA (383A).

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* The minutes of Kick's grand jury testimony were furnished to the defense at the conclusion of Kick's direct testimony at trial.

** Counsel may have had in mind the recently furnished minutes of Kick's grand jury testimony to the effect that tests purportedly *adverse* to the defense had been conducted. Counsel was now asking the government to disclose any tests made the results of which were *favorable* to the defense.

On rebuttal, the government presented the testimony of Albert A. Bercik, Kick's assistant at RCA. On cross-examination, he too was asked "if the parts or any of these parts were physically tested at RCA." His answer was "not to my knowledge" (520A).

In his summation, the prosecutor stated that the *only* evidence going to the genuineness of the transistors was the "uncontradicted" testimony of a representative of petitioner's customer (Mr. O'Brien) regarding the transistors' allegedly inadequate performance. The prosecutor stressed "that this performance is *essentially the same as tests*" (emphasis supplied) and that the jury should therefore conclude that the transistors were not in fact RCA parts (530A-531A).

Petitioner's conviction on the one count of mail fraud was affirmed on appeal. *United States* v. *Munchak*, 443 F. 2d 531 (2d Cir. 1971). In rejecting the contention that the conviction was not supported by sufficient evidence, the Court of Appeals held:

> "There was substantial evidence before the jury for it to conclude that the transistors *were not manufactured by RCA*" (emphasis supplied). *Id.* at 534.

Approximately one month thereafter, it was discovered that Kick's testimony, as well as that of his assistant, Bercik, regarding the making and results of tests by RCA, was false. RCA was a client of the law firm which represented petitioner on appeal. Despite their reluctance to do so, counsel availed themselves of this relationship because they became convinced beyond a moral certainty that petitioner was not guilty. A personal appeal was made to RCA's general counsel as a result of which documentary evidence was discovered relating to tests conducted by RCA (Appendix B hereto).

It was thus disclosed for the first time that various scientific tests performed by RCA *at Kick's request* had in fact shown that selected transistors allegedly misbranded by petitioner and sent to Kick pursuant to a complaint by petitioner's customer (the same customer whose representative gave "uncontradicted" testimony at trial regarding allegedly inadequate performance) *met all of RCA's quality control checks and were manufactured by RCA during the period 1961-63.**

Briefly, the new evidence shows (18B-36B) that Kick received 15 of the transistors in question in December 1967 from a Mr. Leahy, an RCA representative who dealt with petitioner's customer. Kick then forwarded five of the devices to Ted Kisor, packaging engineer at the RCA plant in Summerville, New Jersey, on December 8, 1967, stating "I would appreciate very much your examining these units and advising if possible, whether this is RCA product and when and where they were manufactured and branded."

Kisor's initial answer, dated December 12, 1967, was that the branding on the units was not RCA branding. Kisor continued: "For further proof we suggest you open some of the shells and check for the internal construction."

Kick then sent two sample units to J. Masters, manager of the RCA Product Distribution Center at Mountaintop, Pennsylvania. Kick's forwarding memorandum, dated December 19, 1967, asked Masters for "verification as to whether or not this is actually RCA product." Kick's memorandum continued: "Following our conversation, I received a call from Ted Kisor who has been in contact with someone at Mountaintop. Ted informs me that in-

* One of the defense's contentions at trial was that the alleged poor performance claimed by petitioner's customer may have been caused by other faulty equipment of the customer or misuse of the parts by the customer.

formation he received is that these units could have been made by RCA in 1962 or 1963."

On January 5, 1968, Masters replied by memo to Kick that Don Pahls, Engineering Leader of Germanium Units, "thinks it is R.C.A. product and that they could have been manufactured during the 1961-1963 period." He suggested that the units be sent to a plant in Findlay, Ohio, for further tests. Masters went on to say that he did not believe the brand on the units was put there by RCA. But Masters' memorandum to Kick also enclosed a report by one Al Baloga which concluded that the units passed all of RCA's quality control tests except for a "50 Meg gain test", which could not be performed at Mountaintop.

Kick then sent two of the units in question to W. L. Mertz, security officer at the Findlay, Ohio plant, requesting that the two units be checked for "50 Meg gain." Kick's forwarding memorandum to Mertz, dated January 18, 1968, admitted "our people at Mountaintop agree with our findings relative to the brand marking but *are of the opinion the product was manufactured by RCA during the period 1961-63*" (emphasis added). On January 24, 1968, Mertz replied to Kick that the "50 Meg gain" test had been performed and that the units "are acceptable to our criteria."

Kick's final memorandum to Leahy, dated January 23, 1968, included the following:

> "Our Engineering people . . . tell us that it is quite possible that the units themselves were manufactured by RCA during the period 1961-63. [In fact the engineering people unequivocally stated that they were '. . . of the opinion the product was manufactured by RCA . . .'] We traced these units through four sets of hands and since it is impossible to establish

legal continuity from one to the other, no further action is planned.

"Several samples are now in the hands of our Findlay plant with the request that they perform the 50 meg. gain test. Mountaintop performed all other quality control tests except this 50 meg. gain test and have advised us that the units are good. We requested the 50 meg. gain test because Mason Engineering [petitioner's customer] indicated the units were double the gain specified for this product."

As previously noted, the 50 meg. gain test proved positive and, by Kick's own admission, these were not only RCA transistors but they were RCA units of good quality, especially with regard to the very defects about which petitioner's customer complained.

The motion for a new trial presently in issue was made on the basis of this newly-discovered evidence. In opposition to the motion the government presented the affidavits of three individuals—Kick, Bercik and Robert M. Cohen, another RCA employee.

Kick stated in his four-page affidavit that his denial at trial regarding the conduct of tests by RCA probably was due to the fact that he understood counsel's question to be referring to "conclusive" tests and that the tests he requested were "mere checks" (41B). He admitted, however, that the tests had in fact been made at his personal request and that he "could not reconcile" RCA's findings with his belief that the transistors were misbranded (39B-40B).

As previously noted, Kick also disclosed, for the first time, his role in petitioner's prosecution, stating that during the preparation of the government's case he worked with and assisted Inspector Palmer and the Assistant

United States Attorney in charge of the matter at the time (Givens) (40B).

Kick's affidavit offers no explanation for his testimony before the grand jury, in response to questioning by Mr. Givens, to the effect that at Kick's request RCA conducted tests, the results of which were purportedly adverse to petitioner, or of his failure to disclose the tests to the defense at the meeting of September 30, 1969 at the Post Office in New York City. Nor does the affidavit actually deny that the making of tests was discussed with government officials, the only relevant statement in this regard being that Kick does "not recall ever telling Palmer or any other Government officials that some transistors had performed satisfactorily on prior tests in December, 1967 and January, 1968" (40B-41B).

Finally, Kick's affidavit disclosed that one test in particular had been performed specifically for Inspector Palmer. Kick stated that in August of 1968 he arranged for an oscilloscope test which was conducted in the presence of Inspector Palmer. Beyond the fact that this test was conducted, Kick's statement is extremely hazy. He "cannot recall the identity of the engineers . . . or exactly what was to be tested." As regards the results of this particular test, Kick could only give "a recollection" that whatever transistors were tested "performed marginally or inadequately" (40B).

Bercik's one-page affidavit states that he was not aware of the series of tests requested by Kick in December of 1967 but admits he knew of the oscilloscope test in August of 1968. With respect to his denial at trial of any knowledge of tests, Bercik "believed that to be the case other than that mentioned above [the oscilloscope test]" but "it never occurred" to him to mention that test (43B).

The third affidavit was that of Mr. Cohen. Cohen did not testify at trial and his prior role in the prosecution, if any, is not disclosed. His affidavit, consisting of three pages, is technical in nature and sets forth electronic data, with technical graphs, charts and diagrams annexed. The thrust of the affidavit is that in Cohen's opinion the tests performed by his employer at Kick's request, from which RCA's engineers concluded that the transistors tested met all of RCA's quality standards and had been manufactured by RCA, were "insufficient" (46B). By contrast, one of the newly-discovered documents, a memorandum dated January 18, 1968 and signed by Kick himself, stated that on the basis of the series of tests requested by him: "Our people at Mountaintop . . . are of the opinion the product was manufactured by RCA during the period 1961-63" (31B).

The government presented no affidavits by Inspector Palmer, Mr. Givens or Mr. Sullivan. No attempt was made to show what these government officials knew or recalled regarding the making and results of tests by RCA; discussion of tests in the preparation of the government's case; how and why the government presented testimony to the grand jury regarding the purported results of tests made at Kick's request; why the results of the tests were not revealed to the defense in response to the pretrial requests to which the government consented and the defense's additional request at trial; what, if any, attempts Mr. Sullivan made to verify the testimony of Kick and Bercik when the matter of tests was raised at the trial; whether Mr. Sullivan made any inquiries of Kick before arguing to the jury that the government's evidence of alleged poor performance was "the same as tests", etc.

The District Court denied petitioner's motion on the papers presented and without an evidentiary hearing. The District Court also reread the trial transcript and relied

on its recollection of events at the trial, of witnesses and their demeanor. However, as previously noted, Cohen, to whose affidavit the court accorded significant weight, did not testify at the trial. Inspector Palmer, who did testify at trial, did not submit an affidavit in connection with petitioner's motion for a new trial.

The lengthy opinion of the District Court, subsequently adopted by the Court of Appeals, in substance sets forth the following grounds:

1. Kick's testimony was not perjurious, but was "an inadvertent, unintentional misstatement by a witness" (Appendix C, p. 21a).

2. It is neither probable nor possible that the newly-discovered evidence would have affected the jury's verdict in any way (Appendix C, pp. 21a-27a).

3. Both trial and appellate counsel for petitioner failed to exercise due diligence (Appendix C, pp. 27a-33a).

The District Court also stated, without explaining how it reached this conclusion, that "the government did not know of, nor have reports of the tests, which are the basis of this motion . . . ." (Appendix C, p. 29a).

The Reasons for Granting the Writ

The decision below is in conflict with decisions of this Court or with clearly applicable principles incorporated in such decisions.

The Court of Appeals has so far sanctioned a departure by the District Court from the accepted and usual course of judicial proceedings, as to call for an exercise of this Court's power of supervision.

The result below raises important issues of federal law relating to an accused's right to effective assistance of counsel, which have not been, but should be, settled by this Court.

I

Suppression and Taint

This case raises questions of suppression and taint going to the very integrity of the proceedings leading to petitioner's conviction in a federal court.

This Court has made it clear that a conviction cannot stand when it is tainted by the conduct of the prosecution in failing to disclose, even in good faith, material evidence which should have been disclosed or in permitting the submission to the jury of false evidence which should have been corrected. *Giglio* v. *United States,* 405 U.S. 150 (1972); *Brady* v. *Maryland,* 373 U.S. 83 (1963); *Napue* v. *Illinois,* 360 U.S. 264 (1959).

Furthermore, the Court has held that in such a case it will not defer to the determination of a lower court that disclosure or correction of the evidence in question would not have affected the judgment of the jury. *Giglio* v. *United States, supra; Napue* v. *Illinois, supra* at 271-72. See also *Mesarosh* v. *United States,* 352 U.S. 1, 12 (1956).

Rather, the Court will make its own independent examination of the record to determine for itself whether the false or suppressed evidence denied the defendant his constitutional rights. See *Moore* v. *Illinois* (No. 69-5001), —— U.S. —— (1972). The *Moore* case, decided on June 29, 1972, is the most recent instance known to petitioner in which the Court granted certiorari to make an independent examination of the record in connection with petitioner's claim that the prosecution, in an Illinois proceeding, had failed to disclose exculpatory evidence.

Such an independent examination is of particular importance and urgency where the issue of taint or suppression arises within the context of a federal court prosecution, for then the supervisory jurisdiction of this Court over the proceedings of the federal courts comes into play. *Mesarosh* v. *United States, supra* at 14. While the Court has in this regard noted its desire "to make certain that the doing of justice be made so manifest that only irrational or perverse claims of its disregard can be asserted" (*Communist Party* v. *Subversive Activities Control Board,* 351 U.S. 115, 124 (1956)), the present case falls far short of that standard .

The record shows, and the government has never denied, that Assistant United States Attorney Givens specifically elicited from Kick before the grand jury testimony relating to tests performed by RCA at Kick's request. Mr. Givens thereafter consented to petitioner's request for disclosure of the results of tests to the extent available to the government. When a meeting with the defense was arranged to implement the discovery agreed upon, Kick and Inspector Palmer appeared and withheld disclosure of the RCA tests even as complete disclosure of the results of tests conducted by another company involved was being made. Whether this was done in good

faith or bad faith, it constituted suppression of material evidence requested by the defense.

There is no gainsaying that actual knowledge of the making of tests by RCA resided in at least three persons—Mr. Givens, Inspector Palmer and Kick. Mr. Givens knew at the very least that there had been such tests. Inspector Palmer was present at one. Kick not only knew of the tests but arranged them. *Yet the defense was told nothing by anyone.*

What transpired among Mr. Givens, Inspector Palmer and Kick is not known because the government has not come forward. We know that Kick was utilized by the government in the preparation of its case. But there is no affidavit from Mr. Givens, Inspector Palmer or any other government official. There is, indeed, only the ambiguous affidavit of Kick.

Thus the defense was compelled to go to trial ignorant on a subject vital to petitioner. Under the holding of this Court in the *Giglio* case, the government's prosecutor at trial (Mr. Sullivan) was chargeable at least with the knowledge of Mr. Givens that tests had been made. We submit the government should also be chargeable with the knowledge of Inspector Palmer and with that of Kick whom the government utilized. See the opinion of Mr. Justice Marshall in *Moore* v. *Illinois* (No. 69-5001), —— U.S. —— (1972), in which he suggests that a prosecutor should be "required to be responsible for those persons who are directly assisting him in bringing an accused to justice." See also *Massiah* v. *United States,* 377 U.S. 201 (1964); *U.S.* v. *Bryant,* 439 F. 2d 642 (D.C. Cir. 1971); *Barbee* v. *Warden,* 331 F. 2d 842 (4th Cir. 1964).

Notwithstanding, the government failed to correct Kick's trial testimony that RCA made no tests. What is worse,

it presented on rebuttal Kick's assistant, Bercik, who was permitted to give substantially the same incorrect testimony as Kick. Then, to seal the matter, the prosecutor argued to the jury that it should consider the government's "uncontradicted" evidence relating to performance of the transistors "the same as tests".

All this occurred despite defense counsel's specific reference to petitioner's pretrial motion for discovery and his renewed request for disclosure at trial. The government has presented no explanation as to why the prosecution acted or failed to act in this manner.

The issue of suppression was presented and briefed in the Court of Appeals and in the District Court. The decision below, however, treated petitioner's motion solely as a motion for a new trial based on perjury committed by a prosecution witness, citing *U.S.* v. *Johnson*, 327 U.S. 106 (1946), which is not relevant to a claim of taint or suppression chargeable to the government.

While petitioner has not claimed prosecutorial misconduct in the sense that the government intentionally acted in bad faith, bad faith is not controlling. *Giglio* v. *United States, supra; Brady* v. *Maryland, supra* at 87. The precise extent to which the prosecution should be deemed culpable is impossible to determine because of the government's failure to come forward. Nevertheless, as petitioner argued below, the suppression and taint already chargeable to the government on the record as it now stands should be enough to warrant a new trial, regardless of good or bad faith.

The opinion below states without explanation that the government did not know either of the RCA tests or their results. At least in the first respect, this conclusion is

irreconcilable with the uncontested knowledge of Mr. Givens, attributable to Mr. Sullivan, even without reaching the question of whether the knowledge of Inspector Palmer and Kick is attributable to the government as well. See *Giles* v. *Maryland*, 386 U.S. 66, 96 (1967) (concurring opinion of White, *J.*).

Much of the opinion below seeks to show that petitioner has not been prejudiced because disclosure of the tests could not have affected the jury's verdict. But as we have already shown, certiorari should be granted here, as in the recent *Moore* case, to permit this Court to make its own independent determination on this point. We are prepared to show conclusively that the decision below is in error in this regard. To illustrate:

1. Kick was the government's key witness. The newly-discovered test results, Kick's concealment of them, his lapses of memory, and his misrepresentations before the grand jury, would all seriously undermine his credibility. It is noteworthy that during its deliberations the jury asked to have portions of Kick's testimony reread to it. No such request was made with respect to the testimony of any other witness.

2. The prosecution in its summation and the court below stressed the "uncontradicted" testimony of petitioner's customer allegedly showing that the transistors sold by petitioner were of poor quality. By contrast, the undisclosed RCA test results show that the transistors in question met all of RCA's quality control checks. See *Miller* v. *Pate*, 386 U.S. 1, 4 (1967) in which the prosecutor in his summation capitalized on the absence of material evidence favorable to the defense, which had been suppressed by the prosecution.

3. The opinion below states that the "hard core" of the case was misbranding, not misrepresentation of the identity of the manufacturer. This overlooks (i) that the indictment does not charge misbranding per se (ii) that petitioner's conviction was affirmed by the Court of Appeals on the basis that the evidence showed he misrepresented *the identity of the manufacturer* and (iii) that the court could not know on what basis the jury convicted (see *Mesarosh* v. *United States*, 352 U.S. 1, 12 (1956); *Griffin* v. *United States*, 336 U.S. 704, 708-9 (1949) (Frankfurter, *J.*)).

4. The evidence of petitioner's guilt is far from compelling. The District Court's reliance on alleged evidence that petitioner misrepresented the *date of manufacture* of the transistors by misbranding them with RCA's code (to indicate a date of manufacture in 1967 instead of 1961-63) overlooks the fact, not mentioned in the opinion below, that RCA's code is admittedly *secret* and *the government presented no evidence whatsoever which would show that either petitioner or his customer knew or could decipher the code.*

5. The court below found there was "ample evidence" supporting conviction even after a consideration of the RCA tests. However, under this Court's holdings ample evidence of guilt does not extinguish a claim of suppression of evidence.* In *Giglio*, for example, a new trial was ordered even in the face of a finding by the trial court that disclosure of the new evidence to the jury "would not have affected its verdict." Furthermore, an unconstitutional suppression of evidence should not be overlooked unless the court can find that the error was so unimportant

* Whether the RCA tests would be "conclusive", a conclusion which the District Court rejected, they are at least "material" both as to guilt or innocence and as to the credibility of the prosecution's key witness.

or insignificant that it could be deemed harmless beyond a reasonable doubt. *Chapman* v. *California*, 386 U.S. 18, 22, 24 (1967); *U.S. ex rel. Raymond* v. *Illinois*, 455 F.2d 62 (7th Cir. 1971).**

6. The District Court accorded substantial weight to the Cohen post-trial affidavit in minimizing the possible effect of the undisclosed RCA tests. But Cohen never testified at trial and his view (untested by cross-examination) that his own employer's tests were "insufficient" flies in the face of the fact that RCA obviously considered the tests sufficient at the time. Furthermore, the existence of a conflict of expert opinion would itself be material.

7. The record shows that the results of one of the undisclosed RCA tests (performed by J. Masters) were inadvertently misquoted by the District Court.

8. In its discussion of branding the District Court overlooked the fact that portions of the newly-discovered RCA documents are materially in conflict with Kick's damaging trial testimony regarding the meaning of RCA's secret branding code symbols.

II

The Necessity for a Hearing

As an additional and alternative justification for granting certiorari here we suggest that if the Court declines to review petitioner's claims of suppression and taint on the merits, it would be appropriate and desirable to remand the case to the District Court for a hearing. This would permit the government to make an appropriate

** This case is presently pending before the Court on a petition for certiorari by the State of Illinois.

showing regarding the issues raised and enable the District Court to reassess the matter in light of this Court's very recent holdings in *Giglio* and *Moore, supra,* neither of which was available at the time of the District Court's decision. See *Kolod* v. *United States, supra.* We submit that such a disposition would preserve the integrity of these proceedings and the appearance of justice, without prejudicing the government's legitimate interests.

Under the facts of this case, the denial of petitioner's motion for a new trial without an evidentiary hearing and without the government having made any showing with respect to the conduct of the prosecution conflicts with principles apparent from the decisions of this Court.

In *Kolod* v. *United States,* 390 U.S. 136 (1968), the Court granted certiorari and remanded the case to the district court with instructions to conduct an evidentiary hearing to determine the truth of petitioner's allegations of taint. The Court stated that the government's denial could not be accepted "in lieu of such determination in an adversary proceeding in the District Court." *Id.* at 137. See 8A *Moore's Federal Practice* ¶ 33.03[3] (2d ed. 1970).

Similarly, in all but two of the cases before this Court, of which petitioner is aware, which involved a claim of suppression of evidence by the prosecution or failure by the prosecution to correct false evidence, and where the relevant conduct of prosecution officials and assistants was not clear on the record, it would appear that evidentiary hearings were held (*Moore* v. *Illinois* (No. 69-5001), —— U.S. —— (1972); *Miller* v. *Pate,* 386 U.S. 1 (1967); *Napue* v. *Illinois, supra; Alcorta* v. *Texas,* 355 U.S. 28 (1957)) or, at the very least, affidavits were submitted by those who participated in the prosecution (*Giglio* v. *United States, supra*). In *Giglio* affidavits were submitted

by the United States Attorney and two of his assistants, one who presented the matter to the grand jury and another who tried the case.

In *Pyle* v. *Kansas*, 317 U.S. 213 (1942), where the prosecution made no attempt to rebut a prima facie showing of suppression of evidence and use of false testimony, the Court remanded the case for further proceedings, noting: "No determination of the verity of these allegations appears to have been made." *Id.* at 216. See also *Mooney* v. *Holohan*, 294 U.S. 103 (1935).

In the present case, no evidentiary hearing was held and no affidavits were submitted by the attorney who presented the matter to the grand jury, the attorney who acted as prosecutor at trial or the postal inspector who investigated the case. The opinion below states that neither party requested an evidentiary hearing. But the record shows that the question of the necessity for a hearing was raised by the District Court itself during oral argument of petitioner's motion and that petitioner's counsel stated at that time that in his opinion the facts already before the court warranted a new trial (76B).

We submit counsel was correct but also that the court below, having rejected this position, should not have denied a new trial without at least requiring a showing by the government to refute the issues of suppression and taint apparent on the record. *U.S.* v. *Bryant*, 439 F.2d 642, 653 (D.C. Cir. 1971); *Lee* v. *United States*, 388 F.2d 737 (9th Cir. 1969); *U.S. ex rel. Thompson* v. *Dye*, 208 F.2d 565 (3rd Cir. 1953).

III

The Denial of Effective Assistance of Counsel

The failure to disclose the RCA tests despite the defense's repeated requests prior to and during trial necessarily impaired the effectiveness of petitioner's counsel. It is apparent that these tests were essential to rebut the government's "uncontradicted" testimony regarding the transistors' allegedly inadequate performance and that they could have been effectively used to refute the charges of misrepresentation relating to both manufacture and quality. Furthermore, it was important that the defense be apprised of the tests prior to trial because the technical nature of the tests would require time for preparation and pursuit of relevant leads.

This precise issue was raised in *U. S. ex rel. Raymond* v. *Illinois*, 455 F.2d 62 (7th Cir. 1971) and decided in favor of the accused. The *Raymond* case is presently pending before this Court on a petition for certiorari filed by the State of Illinois. We submit that the question involved is a significant one; that the result below conflicts with the holding of the Seventh Circuit in the *Raymond* case; and that the guidance of this Court would be welcomed by the lower federal courts.*

In addition, the opinion below emphasizes, as an independent basis for denying petitioner's motion for a new trial, the alleged failure of counsel to exercise due diligence in discovering the RCA tests. It is respectfully submitted, however, that counsel was diligent.

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* In *Raymond* the court found a denial of the right to counsel notwithstanding the fact that the prosecution had disclosed the evidence in question to the accused and that no request for additional disclosure was made by the defense.

Counsel sought pretrial disclosure of all reports of scientific tests, which was consented to by the government. During cross-examination of Kick counsel again asked whether RCA had conducted any tests. At the end of the government's case counsel again called for production of any test results favorable to petitioner. At every turn, the defense was told by all concerned that there had been no tests.

The lower court's suggestion that counsel should have recalled Kick for "clarification or further information" is unwarranted. Kick had already denied any knowledge of tests in a meeting with the defense before trial and in sworn testimony at trial. The prosecution confirmed these statements. Even so, there was a last attempt to clear up the matter. When on rebuttal the government presented the testimony of Bercik, Kick's assistant at RCA, he too was asked whether the transistors had been physically tested at RCA and answered "not to my knowledge." If Kick's grand jury testimony had kindled doubt, Bercik's testimony extinguished it.

The court's suggestion that RCA records should have been subpoenaed is also unwarranted. Clearly, trial counsel concluded—quite reasonably—that if RCA's Chief Security Officer, the man in charge of the investigation, and his assistant both repeatedly denied knowledge of any tests, a subpoena to RCA would only have been referred to Kick and would have led to the same result, a denial that any tests were made. In addition, during the period prior to trial, when knowledge of test results was crucial to the preparation of petitioner's case, the defense was not in a position to issue a subpoena.

The court below also overlooked that the RCA tests probably would never have been uncovered but for the

fact that appellate counsel reluctantly decided, in the interests of justice, to avail themselves of their attorney-client relationship with RCA as a basis for a personal appeal to the company's general counsel.

Finally, while attributing to defense counsel a lack of due diligence in discovering the RCA tests. the court failed to impose on the prosecution any similar obligation in seeing to it that the false or erroneous testimony of two of the government's witnesses should be corrected before the case went to the jury. Inspector Palmer was actually present at one test and Kick's testimony before the grand jury concerning tests was elicited by the government and was known to the government months before trial. Under these circumstances, what was the government's obligation?

If the facts do not unequivocally preclude a finding of lack of due diligence, they at least show that the court below imposed a most stringent standard of diligence on petitioner's counsel. Whether or not such a standard may be appropriate in the case of an ordinary motion for a new trial, it is not appropriate where the issues of suppression and taint are present. At least four circuits hold that a failure to exercise due diligence is outweighed by the unfairness which results from a suppression of evidence or taint chargeable to the government. *U.S. ex rel. Raymond* v. *Illinois, supra; Jackson* v. *Wainwright*, 390 F. 2d 288 (5th Cir. 1968); *U.S.* v. *Poole*, 379 F. 2d 645 (7th Cir. 1967); *Levin* v. *Katzenbach*, 363 F.2d 287 (D.C. Cir. 1966); *Barbee* v. *Warden*, 331 F. 2d 842 (4th Cir. 1964). The reason for the distinction is clear:

> "Ordinarily, a finding of lack of due diligence will defeat a motion for a new trial based only upon the significance of newly discovered evidence. But appellant's claim for relief based upon a breach of the prose-

cutor's duty of disclosure challenges the fairness and therefore the validity, of the proceedings, and relief, either on a motion for a new trial or for habeas corpus, may not depend on whether more able, diligent or fortunate counsel might possibly have come upon the evidence on his own. *A criminal trial is not a game of wits between opposing counsel, the cleverer party, or the one with the greater resources, to be the 'winner'"* (Emphasis supplied). *Levin* v. *Katzenbach*, 363 F.2d 287, 291 (D.C. Cir. 1966).

In this case, where there has been no showing that counsel's alleged lack of diligence was known to, acquiesced in, or imputable to petitioner in any way, the effect of the decision below is to penalize petitioner unjustly for the failure of his counsel to meet a technical standard. Such a result is not consistent with the right to effective assistance of counsel under the Sixth Amendment. As Professor Moore has noted:

"The nature of the remand in *Giles* [*Giles* v. *Maryland*, 386 U.S. 66 (1967)] raises a subsidiary issue of defense counsel's role in relation to the suppression or withholding of evidence favorable to his client. To what extent will counsel's lack of diligence . . . preclude a later claim of prosecutorial suppression? On this point *the courts have generally shown reluctance to penalize the defendant for the inadequacy of counsel, perhaps necessarily to avoid a direct claim of ineffective assistance of counsel under the Sixth Amendment*" (Emphasis supplied). 8 *Moore's Federal Practice* ¶16.06[1] (2d ed. 1970).

CONCLUSION

For the reasons stated, this petition for a writ of certiorari should be granted.

Respectfully submitted,

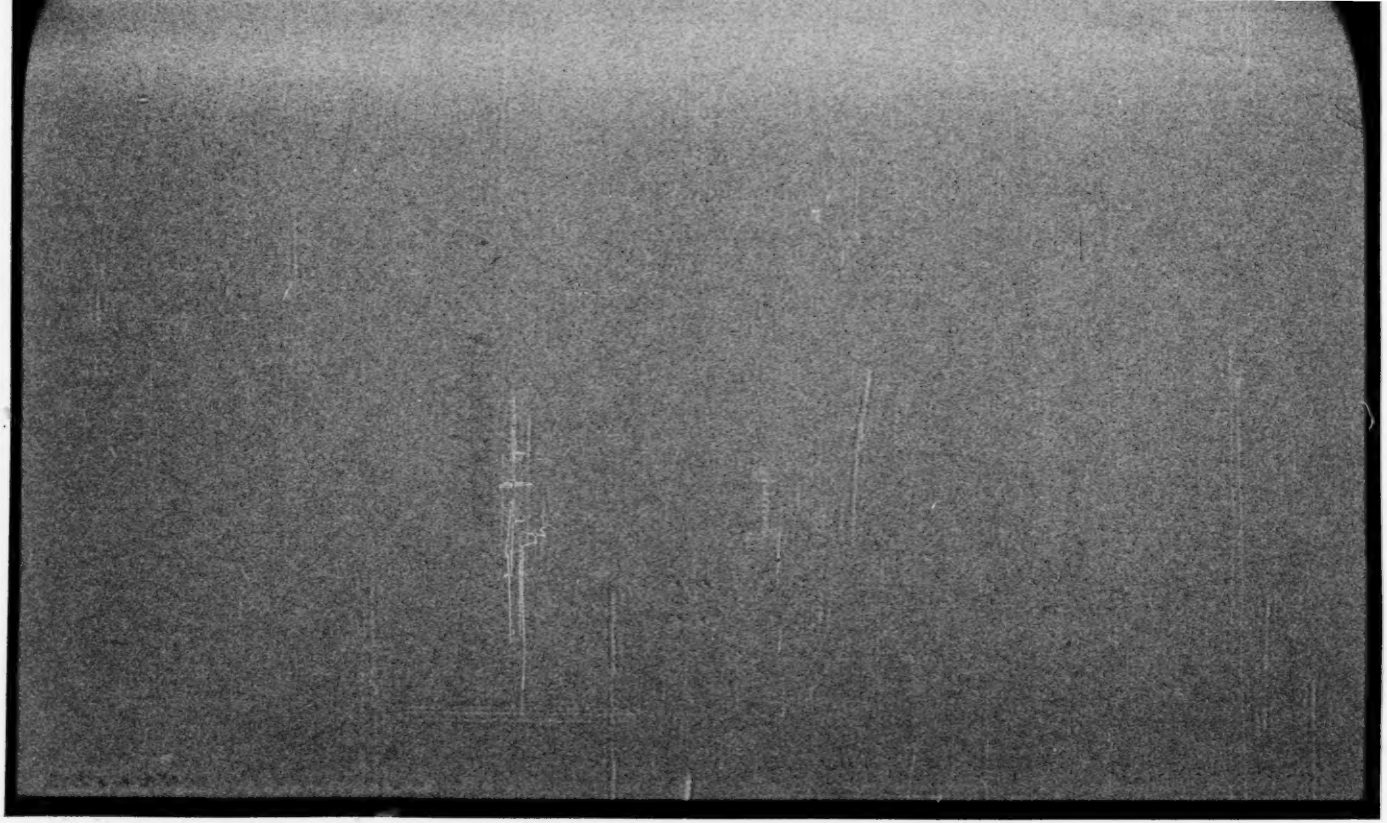
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August 1, 1972

APPENDICES



APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the fifteenth day of June one thousand nine hundred and seventy-two.

Present:

HON. IRVING R. KAUFMAN,
HON. PAUL R. HAYS,
HON. JAMES L. OAKES,
Circuit Judges.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ANDREW MUNCHAK, JR.,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO,
Clerk

Appendix A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 825—September Term, 1971.

(Argued June 13, 1972 Decided June 15, 1972.)

Docket No. 72-1388

UNITED STATES OF AMERICA,

Appellee,

—v.—

ANDREW MUNCHAK, JR.,

Appellant.

Before:

KAUFMAN, HAYS and OAKES,

Circuit Judges.

Appeal from an order of Judge Weinfeld in the United States District Court for the Southern District of New York denying appellant's motion for a new trial under F.R.Crim. P. 33 on the grounds of newly discovered evidence.

Affirmed.

EDWARD N. COSTIKYAN, New York, N. Y. (Paul, Weiss, Rifkind, Wharton & Garrison, Jack C. Auspitz, Warren M. Green, New York, N. Y., of counsel), *for Appellant.*

Appendix A

DANIEL J. SULLIVAN, Asst. U. S. Atty., New York, N. Y. (Whitney North Seymour, Jr., United States Attorney for the Southern District of New York, John W. Nields, Jr., Asst. U. S. Atty., New York, N. Y., of counsel), *for Appellee.*

PER CURIAM:

The order denying appellant's motion for a new trial is affirmed on the basis of Judge Weinfeld's opinion below. 338 F. Supp. 1283 (S.D.N.Y. 1972).

APPENDIX B

June 7, 1971

935-8194

Robert Werner, Esq.
General Counsel
RCA Corporation
30 Rockefeller Plaza
New York, N.Y.

Dear Mr. Werner:

At Judge Rifkind's suggestion, I am taking the liberty of writing you concerning a troublesome and delicate problem which arises out of our representation of a client in a criminal matter. The matter is *United States* v. *Munchak*, in which our firm represented Mr. Munchak on appeal. He had been convicted, in substance, of mail fraud arising out of his alleged selling, as RCA parts, of various electronic parts that were not in fact manufactured by RCA.

The Court of Appeals has affirmed his conviction, and he now faces a four-month sentence. Notwithstanding his conviction and its affirmance, I and Mr. Jack Auspitz, an associate who has worked on the matter in some depth, both of us under Judge Rifkind's supervision, are convinced beyond a moral certainty that Mr. Munchak simply is not guilty of having done what the jury found that he did. I will not attempt to spell out why we are so convinced: we have reviewed the record with care and talked to him at length, and we remain convinced that there has been a miscarriage of justice.

Naturally, being thus convinced, we are trying to make sure that we explore every possible avenue that might persuade the District Court of the error which we believe was committed. And that is why I am writing to you.

Appendix B

One of the things that has bothered us most is that the testimony at the trial by your chief security officer, Mr. Kick, was to the effect that RCA had never conducted any tests whatsoever on the parts which were allegedly misbranded. My surprise has been compounded by the fact that there was also involved in the case a charge of misbranding parts manufactured by Texas Instruments, and the evidence of the thorough testing to which Texas Instruments subjected the suspected materials only fortifies my difficulty in believing that it could be that RCA, with an equally significant stake in this prosecution, would not have subjected the parts to analysis.

It may very well be that if there were tests they were inconclusive. Indeed, on the basis of our information, we suspect that if such tests were made they would have been inconclusive. But that fact alone is of great significance, and one which, if it had been established on the trial, could well have led to a different result below.

In these circumstances, and because I am convinced of the defendant's innocence, I wonder if it would be possible simply to verify the accuracy of Mr. Kick's testimony, without, of course, involving Mr. Kick in the inquiry. If an examination of your files reveals that there had been tests of the transistors in question and that therefore Mr. Kick was in error when he testified that no test had been conducted, I would want to advise Judge Weinfeld before whom we expect to make a motion in reduction of sentence. I have every confidence that, if such were the fact, and if Judge Weinfeld were made aware of it, it would affect his willingness either to reduce the sentence or possibly even grant a new trial.

I recognize that this request could well be viewed as something of an imposition. Nevertheless, I feel a strong

obligation in the interest of justice to present the matter to you, and I hope that you will find it possible to respond favorably.

The name of the individual involved is Andrew Munchak. The name of his company under which the file might be carried is Astronetics Inc.

Sincerely,

Edward N. Costikyan

ENC:sac

APPENDIX C

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

69 Cr. 90

38287

OPINION

UNITED STATES OF AMERICA,

—against—

ANDREW MUNCHAK, JR.,

Defendant.

WHITNEY NORTH SEYMOUR, JR., ESQ.
United States Attorney for the
Southern District of New York
United States Courthouse
Foley Square
New York, New York
Attorney for United States of America

DANIEL J. SULLIVAN, ESQ.
Assistant United States Attorney
Of Counsel

PAUL, WEISS, RIFKIND, WHARTON & GARRISON, ESQ.
345 Park Avenue
New York, New York
Attorneys for Defendant

EDWARD N. COSTIKYAN, ESQ.
JACK C. AUSPITZ, ESQ.
Of Counsel

Appendix C

EDWARD WEINFELD, *D.J.*

This second motion for a new trial, based upon alleged perjury by a government witness and alleged newly discovered evidence, is made after the Court of Appeals affirmed the defendant's judgment of conviction,[1] as well as the denial of the prior motion for a new trial, based also upon alleged perjury of other witnesses, employees of the defendant.

Defendant was found guilty on December 30, 1969, after a seven-day jury trial on one count of a four-count indictment charging mail fraud violations.[2] Two counts, which concerned transistors labelled "JAN CGO 2N 1722," were dismissed by the court at the close of the government's case. The remaining two counts related to transistors labelled "2N 1225 RCA"; the jury acquitted on one count and found the defendant guilty on the other. The indictment charged that the defendant made false representations that labelled 2N 1225 RCA transistors (1) "were manufactured by firms which did not manufacture them"; (2) "were newer than they in fact were"; (3) "were in containers received from the manufacturer when this was not in fact the case"; and (4) "were of higher quality than was in fact the case."

With respect to defendant's present motion, neither party requested an evidentiary hearing, and after argument it was submitted for decision on the moving and opposing affidavits.[3] The court, in its consideration of the

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[1] United States v. Munchak, 443 F.2d 531 (2d Cir. 1971).

[2] 18 U.S.C. § 1341.

[3] *See* United States v. Johnson, 327 U.S. 106 (1946); United States v. Troche, 213 F.2d 401, 403 (2d Cir. 1954); United States v. On Lee, 201 F.2d 722 (2d Cir.), *cert. denied*, 345 U.S. 936 (1953).

motion, in addition to its recollection of events at the trial, of witnesses and their demeanor, has read the entire trial transcript.[4]

In order to put the defendant's motion in proper focus, it is desirable at the outset to outline the substance of testimony. The evidence abundantly established that soon after defendant had received an order for a shipment of 2N 1225 transistors, he ordered five peg stamps bearing the insignia "RCA" circled by "2N 1225" and letter designations "D" and "H7",[5] and that the casings of transistors shipped by defendant's firm were marked with the symbols from the peg stamps. The defendant's version of his purpose in ordering the stamps and the use to which they were put was a central issue at trial.

On his present motion, the defendant asserts that newly discovered evidence from RCA's files shows that Albert Kick, chief security officer for RCA Electronic Components, did not tell the truth when he testified at trial that RCA had not performed any tests on the transistors in evidence; the defendant contends that these tests show the transistors were manufactured by RCA and were of good

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[4] *See* United States v. Johnson, 327 U.S. 106, 112 (1946); Brown v. United States, 333 F.2d 723 (2d Cir. 1964) (per curiam); United States v. Garrison, 296 F.2d 461, 465 (7th Cir. 1961), *cert. denied*, 369 U.S. 804 (1962); Wolcher v. United States, 233 F.2d 748, 751 (9th Cir.), *cert. denied*, 352 U.S. 839 (1956); United States v. On Lee, 201 F.2d 722, 723 (2d Cir.), *cert. denied*, 345 U.S. 936 (1953); United States v. Keogh, 271 F. Supp. 1002, 1006 (S.D.N.Y. 1967), *aff'd in part*, 391 F.2d 138 (2d Cir. 1968).

[5] 2N 1225 is known in the industry as a "Jedec" symbol, usually stamped on the transistor casing. There are about 200 casing shapes. 2N is a genus of transistors; 1225 is the specification for a certain type; the letters D and H7 represent the manufacturing and shipping dates. RCA is one of two companies that manufacture 1225 transistors.

quality.[6] The charge must be considered against the totality of the evidence.

The defendant Andrew Munchak, Jr. is the president and owner of Astronetics, Inc., a dealer in the buying and selling of surplus transistors and other electronic parts. In August 1967, F. G. Mason Engineering Company, a manufacturer of radio surveillance equipment, placed an order for 5000 "RCA 2N 1225" transistors. After passing through intermediate distributors, Astronetics, Inc. received an order August 31 for "2N 1225" transistors. Two days thereafter, the defendant ordered from Patterson Stamp Company five "peg stamps" bearing the mark "RCA", circled by the designation "2N 1225", "H7" and "D". A peg stamp is a rubber dye at the end of a pencil-like shaft used for marking purposes. Several days after receiving the peg stamps, Astronetics shipped, in partial fulfillment of the order approximately 2100 transistors which, after passing through intermediate distributors, finally were delivered to Mason Engineering. The casings of the 2100 transistors bore an RCA symbol similar to that appearing on the stamps Munchak had ordered. Collins, president of Patterson Stamp Company, testified that in his opinion the impressions on the tops of those transistors, nine of which were received in evidence at the trial, had been made by the peg stamps purchased by Munchak. A production supervisor of the Mason company testified that the transistors received by it failed to perform in the manner of prior "RCA 1225's"; they would regenerate or oscillate;

[6] The defendant also moves for a judgment of acquittal, but that this court has the power to grant such a motion after entry of the judgment of conviction is open to serious doubt; in any event, there is substantial evidence to support the jury's verdict. *See* United States v. Weinstein, Docket No. 71-1942 (2d Cir. Nov. 16, 1971).

they drew too much current and had a very short life span.[7] The deficiencies resulted in Mason company officials complaining to RCA, and the delivery by them to RCA in December 1967 of about fifteen of the transistors, with the bulk of the shipment returned to the intermediate company from which it had been purchased. Eventually these were returned to Astronetics.

A postal inspector testified to Munchak's statements that the transistors sold to Mason were part of a salvage lot Astronetics had purchased about three years previously; that when received they were placed on shelves in old and dirty boxes with old dates on them; that to make them more saleable they were repackaged in new small boxes imprinted with peg stamps purchased for that purpose; that the stamping was done by Willard McElwain and Gloria and Anne Smith, employees of Astronetics. However, each employee denied having stamped any boxes with the peg stamp. Mason and each intermediary distributor through whom the shipment passed testified that the transistors were not in individual boxes, but were bulk packaged in large plastic boxes and in a plastic bag.

We now consider the testimony of Albert Kick upon which the defendant bases his claim for a new trial on the ground of alleged perjury and newly discovered evidence. Kick had been with RCA for twenty-seven years. In December 1967, he initiated an investigation following receipt by RCA of the fifteen transistors[8] from Mason upon

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[7] Further examination into the quality of the transistors was cut off by defense counsel's objection on the ground of lack of relevance (292A). (References designated "A" refer to the Joint Appendix on Appeal.)

[8] Nine of these transistors were received in evidence at the trial 2 years later (Government Exhibits 3A to 3i). While other transistors were in evidence, the critical testimony related to the 9 transistors which were part of the 15 RCA received from Mason.

its complaint as to the performance of the transistors contained in the Astronetics shipment. Kick's direct testimony concerned two major subjects—the stamping on the RCA transistors in evidence and conversations with Munchak during the course of the investigation. He also discussed when the transistors in question would have been produced were they of RCA manufacture. Kick testified that the markings on the transistors were not made by RCA; that in his opinion the peg stamps purchased by Munchak were used to stamp those transistors in evidence which had been sold to Mason. As already noted, Collins of the Patterson Stamp Company had previously testified to the same effect. Kick explained, on the basis of RCA's internal code system, why the casings of the transistors delivered to Mason could not have been stamped by RCA—the markings "D", "7" and "H" were not the style or type used by RCA; the letter showing the plant manufacture was missing; the letter for the manufacturing date was in the wrong position; the number for the shipment date was upside down. According to RCA's code system, the number on the nine transistors in evidence indicated a shipment date of August 1967 and recent manufacture. Kick testified that while he could not state with certainty whether or not RCA had manufactured the casings on which the stamp appeared, if RCA had manufactured them, it was no later than 1964, because in that year the company had changed the construction of the casing and the transistors sent to Mason were of the old type.[9]

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[9] "Q. [Mr. Sullivan, government counsel]: . . . I would like to ask you one more question with respect to the transistors which have been identified as 3A through 3'i', 31A and 2.

Appendix C

Kick then testified to matters which the government urged as false exculpatory statements by Munchak. He called upon Munchak in January 1968 and told him he was tracing counterfeit transistors and had information that they had originated with Astronetics; when he handed Munchak samples of those shipped to Mason, the defendant, upon looking at them, stated, "anyone can see these are counterfeit or over-stamped, that they didn't come from here."

Under cross-examination, Kick adhered to the substance of his direct testimony that the transistors had been counterfeited with the RCA symbol and that Munchak had denied his firm had shipped them. Kick again acknowledged that the transistors in evidence could be genuine

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And I want to ask you if you can tell from looking at those transistors whether or not they were made by RCA.

"Mr. Ward [defense counsel]: In your opinion.

"Q. I am not speaking of the markings. I am just speaking of the casing.

"A. RCA did use this type of construction.

"Q. Can you tell with any certainty whether RCA did or did not manufacture that casing?

"A. No, sir.

"Q. You can't tell with any certainty?

"A. No, sir.

"Q. Can you tell with any certainty when RCA made the casing, if it made it?

"A. It would have been in the period 1961 through early 1964.

"Q. And how are you able to tell us that it was not made after 1964?

"A. The four leads or the four wires that you see on this particular unit that I am holding are imbedded in glass.

If you examine the bottom of the unit, you would see that each lead goes into a piece of glass that shields it.

. . . .

"A. . . . In, I believe August 1964, RCA changed its method of manufacture. . . ." (337A-338A.)

RCA parts, but asserted that they would have been manufactured prior to 1964.[10]

We now come to that portion of Kick's testimony which the defendant alleges is perjurious. At the very conclusion of his cross-examination, he testified:

> "Q. You have told his Honor and the jury about your activities in connection with this investigation and the preparation of various photographs which had been shown to you.
>
> "Will you tell his Honor and the jury whether RCA ran or conducted any tests on these allegedly non-RCA components, indicating Government's Exhibits 3A through 3'i'?
>
> . . . .
>
> "A. There were no tests made on these Exhibits 3A through 'i'."[11]

It is observed that counsel's question referred to the nine transistors in evidence and the witness responded in kind. It now appears that RCA at Kick's instigation, had conducted tests on two transistors of the Mason shipment.

Before considering defendant's charge that Kick's testimony was perjurious, the trial testimony should be rounded out. Munchak testified in his own behalf. He denied that he or anyone else in Astronetics' employ stamped the casings of the transistors shipped to Mason. He acknowledged he had made statements that the transistors had been

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[10] "Q. I believe, in addition, you testified that the devices . . . Government's exhibits 3A through 'i' could possibly . . . be genuine RCA parts, but that they would have had to have been manufactured prior to 1964; is that correct?
"A. Yes, sir." (356A.)

[11] 368A-369A.

obtained by lot purchase three years before and that they could have been obtained in lots during the last eight or ten years. He testified he had ordered the peg stamps, but only to stamp, as was Astronetics' practice, the outer lids of white boxes in which the units were shipped, thus contradicting the testimony of government witnesses that the shipments had been in large plastic containers. His testimony was also in contradiction of that of employees who denied they had ever stamped either the transistors or boxes. Munchak claimed that he had thrown away the peg stamps because they could no longer be used,[12] but there was evidence that an individual stamp could make up to 100,000 impressions. Munchak denied the testimony of Kick and another RCA investigator attributing to him the alleged false exculpatory statements. The evidence offered by the government was indeed substantial. Obviously the jury chose to believe the goverment's witnesses and to reject Munchak's explanations.

We now consider the alleged newly discovered evidence urged in support of a new trial. On June 18, 1970, appellate counsel were retained by Munchak to prosecute his appeal, which was argued on March 8, 1971. The judgment of conviction was affirmed on June 1, 1971.[13] Six days thereafter, appellate counsel, who state RCA "has been a client of the firm," wrote to RCA's general counsel and, referring to Kick's trial testimony, requested information as to whether tests had been made on the transistors. The general counsel readily cooperated, furnished informa-

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[12] The postal inspector had testified to Munchak's statement that he had thrown away the stamps a week after purchase because they were "fully used up." (198A, 226A.)

[13] United States v. Munchak, 443 F.2d 531 (2d Cir. 1971).

tion as to Kick's investigation and made available to appellate counsel RCA's interoffice reports and memoranda, now attached to the moving papers.

It appears that on December 8, 1967, Kick sent five of the fifteen transistors that RCA had received from Mason to Ted Kisor, packaging engineer at the RCA plant in Somerville, New Jersey, for examination to determine whether they were RCA products, and when and where they were manufactured and branded. Kisor's conclusion was that the brand marking on the units was not an RCA brand, and in addition, "the glassing area around the leads does not look like RCA's glassed area . . . ." He suggested that the transistors be opened and checked for internal construction. On December 19 Kick sent two sample units to J. Masters, manager of the Mountaintop Product Distribution Center, with a request for identification as to the type of transistor and for verification as to whether or not they were actually RCA products. In his memorandum to Masters, Kick noted: "We have examined the brand markings and are satisfied that these markings were not applied by RCA." He added that he had recently received information "that these units could have been made by RCA in 1962 or 63." Masters replied to Kick by memorandum dated January 5, 1968, that the project engineer at Mountaintop "thinks" the two units were RCA products and "could have been manufactured during the 1961-1963 period"; he, too, was of the view that the units had been misbranded with the RCA mark and detailed his reasons therefor. He concluded: "Even though the units are good with the exception of the 50 Meg gain test, Germanium has been known to drift, but I don't think they are good units shipped by an R.C.A. location," and suggested they be sent to the Findlay, Ohio

plant for the 50 Meg gain test. Kick then forwarded two of the questionable units to the Findlay, Ohio plant for the suggested test. His memorandum to that plant stated: "Enclosed are two type 2N1225 units which contain counterfeit brand markings. . . . Our people at Mountaintop agree with our findings relative to the brand marking but are of the opinion the product was manufactured by RCA during the period 1961-63." On January 23, 1968, before getting a report of the tests at Findlay, Kick, in an interoffice memorandum, summarized the results of the tests and closed the file.

> "Our investigation disclosed that the units which you brought to our attention were definitely not branded by RCA and this brand is fraudulent.
>
> "Our Engineering people, however, tell us that it is quite possible that the units themselves were manufactured by RCA during the period 1961-63.[14] We traced these units through four sets of hands and since it is impossible to establish legal continuity from one to the other, no further action is planned."

The next day, January 24, the Findlay plant reported that the two units received by it for the 50 Meg gain test were acceptable to RCA criteria.

Although the matter was then closed, the investigation was unexpectedly reopened in August 1968, after it was discovered that it was Munchak who had ordered the five peg stamps from the Patterson Stamp Company. At that

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[14] In sum, all reports indicated that (1) the brand marking was fraudulent, and (2) that the units were manufactured no later than 1963. In the course of testing, Kisor and Masters, as well as Kick, had expressed doubt, for various reasons, that the units were RCA transistors.

time, Postal Inspector Palmer contacted Kick and both went to the RCA plant in Somerville, New Jersey, and caused the transistors to be checked for performance on an oscilloscope. There is no written report of this test. Kick now states he cannot recall "the identity of the engineers who I gave them to or exactly what was to be tested. I merely have a recollection that they performed marginally or inadequately." [15]

Kick's first appearance was before the grand jury on January 20, 1969, when he testified as follows:

> "Q. Did you run any tests on components with this stamp on it, which was not an RCA stamp such as you have been shown? By 'you,' I mean RCA.
>
> "A. RCA did not, I did not. I had asked the factory engineers to make some tests on those units to see whether they measured up to our specifications.
>
> "Q. Did they?
>
> "A. No, sir." [16]

While the defendant charges that Kick lied in saying the units did not measure up to specification, there is no factual support for this charge. Rather than taking his answer to refer to the tests ending in January 1968, when the investigation was deemed closed, it could be an accurate reference to the more recent August 1968 oscilloscope test, which found the transistors did not measure up to RCA specifications. In any event, the oscilloscope test is unfavorable to defendant's contention as to quality of the transistors and failure to specify the particular test cannot be assigned as error. It should be noted that Kick defi-

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[16] Grand Jury minutes at 9.

[15] Kick affidavit at ¶6.

nitely stated that RCA factory engineers had "made some tests on those units" and that his grand jury testimony was in the possession of the defendant at trial.

We turn to the trial, where Kick testified RCA had not made "tests on these exhibits 3A through 'i'", a reply which defendant contends is perjurious and which Kick and the government defend as inadvertent forgetfulness. The determination of this issue—whether Kick's answer was erroneous but inadvertent, or intentional and perjurious—gives direction to the standard to be applied in the motion for a new trial. Kick, in an affidavit submitted by the government in opposition to the defendant's motion, categorically denies any intention to mislead the court or jury or to state anything he did not believe to be true. He points out that his trial testimony related to three subjects: (1) his conversation with Munchak in January 1968; (2) the reasons why the label was counterfeit; and (3) whether and when the transistors were assembled by RCA. He notes his testimony did not concern performance characteristics of the RCA 2N 1225 transistors and swears that he did not discuss this in pretrial preparation.

With respect to his answer to the final question put to him at the end of his cross-examination, he swears it never occurred to him to mention prior performance tests because he understood the question to be referring to conclusive tests—the type which involved full scale electrical tests—whereas he considered the tests he caused to be made as mere checks which were far from conclusive. Factually, this is so; an affidavit submitted on this motion by an RCA official familiar with proper and adequate testing of RCA 2N 1225 transistors does establish that the tests of which Kick knew were far from adequate; that testing performed upon only two transistors was "insuffi-

cient to be useful" and that the number of tests was "insufficient to determine that the transistors in question were 2N 1225 types." [17]

In appraising Kick's explanation of his answer,[18] it is significant that he has not sought refuge in a claim that his answer was literally true—a position which readily could have been advanced, since the question put to him by defense counsel specifically asked whether any tests had been conducted on "Government Exhibits 3A through 3'i'" (the nine transistors in evidence),[19] and his answer parroted those words. Such an explanation of his answer, which came at the end of a long cross-examanination, could readily be accepted as plausible, although it may be acknowledged that the question also could be construed as intending to elicit whether RCA had performed tests on any transistors, whether or not in evidence. However, Kick has not sought to avail himself of such an excuse, but instead has given his explanation, as noted, of why the tests made two years before were not recalled by him when he testified. Considering that the principal thrust of his and the mass of trial testimony centered about the charge of misbranding the casings, and Munchak's denial

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[17] The range of tests normally performed by RCA on its 2N 1225's included 3 classes: Group A (18 electrical performance tests); Group B (13 performance tests); and Group C (2 groups of mechanical and environmental tests). Only 6 of the 18 tests in Group A were conducted by RCA in December 1968 and January 1969, and none of the tests in Groups B and C.

[18] Kick avers another explanation for his answer was that he probably did not recall performance tests because the question seemed to refer to tests seeking to determine whether RCA manufactured the transistors, a subject as to which he did testify.

[19] The record does not indicate that the two transistors tested were part of the nine in evidence.

they were stamped by him or his employees, Kick's explanation is acceptable. Viewed against the backdrop of the entire trial and the demeanor of witnesses at the trial,[20] I do not find that his challenged answer was wilfully and knowingly false or intended to conceal that the tests in question had been made; it was not perjurious, but was an inadvertent, unintentional misstatement by a witness.[21]

Thus we reach the question whether the reports of the RCA tests constitute newly discovered evidence sufficient to warrant a new trial. Motions for a new trial bring into play two factors, one that there should be finality of judgments and that sentences imposed should be carried out promptly, and the other that a defendant must not be deprived of a fair trial.[22] The standard of materiality which must be satisfied to obtain a new trial on the basis of newly discovered evidence varies with the circumstances under which the defendant was deprived of knowledge of the

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[20] *See* United States v. Johnson, 327 U.S. 106, 112 (1946); Brown v. United States, 333 F.2d 723 (2d Cir. 1964) (per curiam); United States v. Garrison, 296 F.2d 461, 465 (7th Cir. 1961), *cert. denied*, 369 U.S. 804 (1962); Wolcher v. United States, 233 F.2d 748, 751 (9th Cir.), *cert. denied*, 352 U.S. 839 (1956); United States v. On Lee, 201 F.2d 722, 723 (2d Cir.), *cert. denied*, 345 U.S. 936 (1953); United States v. Keogh, 271 F. Supp. 1002, 1006 (S.D.N.Y. 1967), *aff'd in part*, 391 F.2d 138 (2d Cir. 1968).

[21] *See* United States v. DeSapio, 435 F.2d 272, 285-87 (2d Cir. 1970), *cert. denied*, 402 U.S. 999 (1971); United States v. Faustin, 371 F.2d 820 (2d Cir.) (per curiam), *cert. denied*, 387 U.S. 935 (1967). *See also* United States v. Troche, 213 F.2d 401, 403 (2d Cir. 1954); Larrison v. United States, 24 F.2d 82, 87 (7th Cir. 1928).

[22] *See* United States v. Johnson, 327 U.S. 106, 112 (1946); United States v. Fassoulis, 203 F. Supp. 114, 117 (S.D.N.Y. 1962).

existence of such evidence.[23] Here, since there was no perjury, and since there is no charge of prosecutorial misconduct, nor any support for such a charge with respect to these tests,[24] the defendant must show that knowledge and use of them "would probably produce a different verdict." [25]

The hard core of the case, as it developed at trial and was presented to the jury, concerned the misbranding of the transistors with the RCA symbols. Thus, defense counsel, in opening, told the jury:

> "Let's look at the questions and the issues for just a moment or two. Essentially the issues in this case are whether the defendant, Mr. Munchak, himself or

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[23] *See* United States v. Miller, 411 F.2d 825, 830-31 (2d Cir. 1969); United States v. Keogh, 391 F.2d 138, 146-48 (2d Cir. 1968); Kyle v. United States, 297 F.2d 507, 512 (2d Cir. 1961).

[24] Defendant does point to the fact that, as noted above, a postal inspector was present at the August 1968 oscilloscope test. But that test cannot form the basis for a new trial since it found the transistors performed "marginally or inadequately," and its admission at trial could only have bolstered the government's case.

[25] The standard formulation, sometimes referred to as the *Berry* rule after Berry v. State, 10 Ga. 511, 527 (1851), requires (1) the evidence must have been newly discovered since the trial; (2) it must be material to the factual issues at the trial and not merely cumulative or impeaching the character or credit of a witness; and (3) it must be of such a nature that it would probably produce a different verdict in the event of a retrial. *See* United States v. Mayersohn, Docket No. 71-1676 (2d Cir. Nov. 22, 1971); United States v. Randaccio, 440 F.2d 1337 (2d Cir. 1971) (per curiam; United States v. Polisi, 416 F.2d 573, 576-77 (2d Cir. 1969); United States v. Costello, 255 F.2d 876, 879 (2d Cir.), *cert. denied*, 357 U.S. 937 (1958); *cf.* United States v. DeSapio, 435 F.2d 272, 286 (2d Cir. 1970), *cert. denied*, 402 U.S. 999 (1971); United States v. Faustin, 371 F.2d 820 (2d Cir.) (per curiam), *cert. denied*, 387 U.S. 935 (1967).

someone acting at his direction, misbranded certain 2N 1225 components to indicate that they had been manufactured by RCA by some five rubber peg stamps, little stamps, which Mr. Munchak purchased in September 1967." [26]

In his summation on this issue, he told the jury:

"We submit to you that the Government has failed to prove beyond a reasonable doubt that Mr. Munchak either rebranded the 2100 2N 1225's before shipping them to Garrett in September 1967, or knew that they had been rebranded when he shipped them or that he intended to pass them off as new RCA parts." [27]

And the court, in its instructions to the jury, although to be sure it referred to other matters, stated:

"Thus a prime issue is whether the peg stamps ordered for the 2N 1225 RCAs were used on components for misbranding or were they used to stamp the outer boxes within which they were contained.

"Defense counsel in his summation put this disputed question rhetorically: was it to stamp transistors or to stamp boxes?" [28]

The defendant spun out an elaborate tale to support his categorical denial that he had stamped the transistors and to explain his use of the peg stamps. Defense counsel urged that the defendant innocently had the misbranded

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[26] Stenographer's Minutes, Dec. 18, 1969, at 13-14.

[27] Stenographer's Minutes, Dec. 29, 1969, at 10.

[28] 554A.

transistors in stock prior to the time he ordered the peg stamps; that one of the misbranded transistors was sent as a sample from which the stamps were made; that the peg stamps were actually purchased to stamp individual boxes in which the transistors were shipped; and that an intermediate distributor had performed the painstaking chore of removing the transistors from their individual boxes, bulk packaging them, and then sending them on to the next distributor.[29] The jury disbelieved this incredible story. His elaborate but futile attempts to disguise and deny the fact that he had stamped the transistors underscored the government's charge that Munchak knew the brands were fraudulent and intended to pass off the transistors for what they were not. The tests lend no credence to the defendant's story, and the evidence remains intact that it was Munchak who misbranded the transistors.

The defendant contends, however, that he had known of the reports of the tests, he could have demonstrated there was no misrepresentation, that the transistors were in fact what the brand represented them to be—RCA 2N 1225's of good quality. But there was ample evidence of misrepresentation at trial which remains even after a consideration of these tests. The indictment charged several misrepresentations—that the transistors were manufactured by RCA, that they were of higher quality than was in fact the case, and that they were newer than in fact they were; and the court charged that the defendant was accused of misrepresenting the quality and newness of the transistors

[29] In addition to the fact that each of the distributors involved denied that they removed such packaging, the story itself challenged credulity. It is difficult to believe that an intermediate distributor would take the trouble to remove 2100 transistors from their individual boxes, to no apparent purpose, and then ship them on in bulk packaging.

as well as their manufacture, and that any misrepresentation would be a sufficient basis upon which to convict.

Defendant on this motion overstates both the importance of the representation of RCA manufacture at trial[30] and the alleged conclusiveness of the present tests. The government's own case developed that these might have been RCA parts, but had to have been manufactured prior to 1964, and emphasized they were falsely stamped to indicate a 1967 date of manufacture. At the trial Kick several times acknowledged they could have been of RCA manufacture. However, defense counsel charges that the tests reveal and Kick knew that the engineering people were "of the opinion that the product was manufactured by RCA. . . ." Kick's statement, however, was a loose paraphrase which overstated a report to him,[31] and was countered by other indications in the reports of the tests. For example, the manager of the Product Distribution Center wrote: "I don't think they are good units shipped by an R.C.A. location"; and a packaging engineer commented: "In addition to the branding, the glassing area around the leads does not look like RCA's glassed area." The tests measured whether the transistors performed

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[30] While the defendant points to parts of the charge which emphasized the misrepresentation with respect to RCA manufacture, these must be read in the context of the whole charge which also explained the other misrepresentations and must be placed against the backdrop of the entire trial which focused on the issue of misbranding the transistors.

[31] His reference is to a memorandum from Masters which states an engineer "*thinks* it is an R.C.A. product and that they *could* have been manufactured during the 1961-63 period." (emphasis added) but concludes, "I don't think they are good units shipped by an R.C.A. location." Memorandum from Masters to Kick, January 5, 1968.

within the ranges specified for that family of transistors, but, as the affidavit of an RCA expert submitted on this motion shows, both the number of transistors submitted and the number of tests performed were insufficient to be useful. Constant reiteration by the defense that the tests are conclusive does not make them so.

Similarly, on the issue of quality, in addition to the affidavit which demonstrates that the tests were insufficient to determine whether these were really 2N 1225's or another type of transistor in the same family, there is the substantial and persuasive testimony of Mason's production supervisor that the transistors did not measure up to the performance of previous 2N 1225's. The insufficient tests on two transistors do not overcome the force of this testimony based on Mason's actual experience with a substantial number of the transistors.

Finally, the reports of the tests, had they been availed of at trial, would have given added strength to the government's case that the transistors were misbranded to represent they were newer than in fact they were. All who tested them were in accord that if they were RCA products they were of 1961-63 vintage, although they were misbranded to show a 1967 date of manufacture. Proof of this misrepresentation does not admit of challenge. This additional evidence would have underscored Munchak's admission that the transistors he shipped had been purchased three years previously in his denial he had shipped the transistors when confronted with the samples by Kick, and would have added devastating force to the government's case.

In short, the tests would not undermine the substantial evidence that the transistors were not what they were represented to be, that Munchak falsely branded them and

then developed an elaborate explanation in an attempt to conceal the facts. Had these reports been availed of either as proposed exhibits or for questioning of Kick or other witnesses, rather than detracting from the government's case, they would have added weight to the already substantial evidence.

I am persuaded upon the totality of the trial evidence that whatever test is applied, *Berry*,[32] or its less burdensome counterpart, *Larrison*, [33] the defendant is not entitled to a new trial. Giving due consideration to the use to which information as to the tests and their results could have been put by skilled counsel,[34] and assessing what difference it might have made in trial preparation,[35] I am not persuaded that the jury "might" [36] have, much less that it "probably" would have, reached a different result.

Entirely apart from the foregoing finding, which alone requires denial of the motion, it must be denied upon another ground. It is axiomatic that a motion for a new trial must fail if the evidence, with due diligence, could have been discovered before or at trial.[37] The duty of

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[32] *See* Berry v. State, 10 Ga. 511, 527 (1851).

[33] *See* Larrison v. United States, 24 F.2d 82, 87 (7th Cir. 1928).

[34] *Cf.* United States v. Miller, 411 F.2d 825, 832 (2d Cir. 1969). *See also* United States v. Bonanno, 430 F.2d 1060, 1063-64 (2d Cir.), *cert. denied*, 400 U.S. 964 (1970).

[35] *Cf.* United States v. Polisi, 416 F.2d 573, 577-78 (2d Cir. 1969).

[36] " '[M]ight' means something more than an outside chance although much less than the 'would probably' of the Berry rule." Kyle v. United States, 297 F.2d 507, 512 (2d Cir. 1961).

[37] *See, e.g.*, United States v. Edwards, 366 F.2d 853, 873-74 (2d Cir. 1966), *cert. denied*, 386 U.S. 908 (1967); Brown v. United

diligent inquiry is not suspended during the pendency of an appeal,[38] particularly where counsel is alerted to the facts which may be of significance.

The record demonstrates a lack of due diligence in attempts to obtain the tests or the reports thereon. Defense counsel, and subsequently appellate counsel, had reason to believe that RCA had conducted tests, yet failed either to subpoena RCA records or make any request of RCA until six days after the judgment of conviction was affirmed—two years and four months after the indictment was returned.

The defendant was indicted on February 3, 1969. His trial counsel was sensitive to the likelihood that tests had been made. He moved for discovery and inspection on March 4, 1969, and among other matters sought "[a]ll reports of scientific tests . . . in connection with this case and the tangible evidence which has been subjected to testing." In his affidavit in support of the motion, he further stated, "[t]hese charges could only have been based on scientific tests . . . including, on information and belief, enlarged photographs both of allegedly 'misbranded' components and of allegedly 'genuine' components." The gov-

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States, 333 F.2d 723 (2d Cir. 1964) (per curiam); United States v. Passero, 290 F.2d 238 (2d Cir.), *cert. denied*, 368 U.S. 819 (1961); United States v. Pellegrino, 273 F.2d 570 (2d Cir. 1960) (per curiam); United States v. Costello, 255 F.2d 876, 879 (2d Cir.), *cert. denied*, 357 U.S. 937 (1958); United States v. Hiss, 107 F. Supp. 128, 135-36 (S.D.N.Y. 1952), *aff'd on opinion below*, 201 F.2d 372 (2d Cir.) (per curiam), *cert. denied*, 345 U.S. 942 (1953).

[38] *See, e.g.*, United States v. Rao, 318 F. Supp. 416, 420 (S.D. N.Y. 1970); United States v. Hoffa, 247 F. Supp. 692, 701 (E.D. Tenn. 1965), *aff'd*, 382 F.2d 856 (6th Cir. 1967), *cert. denied*, 390 U.S. 924 (1968).

ernment agreed to discovery and inspection to the extent that the United States Attorney or the Post Office Department had the items sought.[39] The government added: "Where the Government does not have evidence sought by the defense it should not be required to collect it for the defendant, but defendant should subpoena such items from those who have them if it deems this necessary." Since the government did not know of, nor have reports of the tests, which are the basis of this motion, here was an unequivocal statement advising the defense to subpoena records if they were deemed important. Yet, no such subpoena was ever served on RCA either before or during the trial; nor, with full access to the evidence in the government's possession, did the defendant seek to have tests performed on any of the questioned transistors. Rather, trial counsel contented himself with a request made of Kick at a September 1969 meeting at the 8th Avenue Post Office. The casualness of this meeting appears from the fact that trial counsel's memory of it was "sparked" only after the Assistant United States Attorney, in opposing this motion, with commendable candor called to appellate counsel's attention that such a meeting had occurred. At that meeting Kick produced certain photographs of transistors at issue. The trial did not start until three months thereafter; yet in the interim no subpoena was served upon RCA, nor any letter addressed to it such as so readily produced the tests after the conviction was affirmed.

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[39] The government had no knowledge of these tests until they came to light in connection with this motion. The defendant does not contend otherwise; and Kick swears that he does not recall telling any government official of the tests conducted in December 1967 and January 1968.

It also appears that for a substantial period during the trial, at least five days, information that some tests had been performed at RCA was known and available for use by a diligent defender.[40] The prosecution delivered to the defense, pursuant to section 3500 of Title 18, United States Code, Kick's grand jury testimony that he "had asked the factory engineers to make some tests on those units to see whether they measured up to our specifications."[41] When Kick gave his negative answer to the last question on cross-examination, defense counsel knew that on its face it was at variance with his grand jury testimony on this subject. Kick's examination was completed at the morning session on December 24, and a long holiday weekend followed before the resumption of trial on the morning of December 29. In the interval no subpoena had been issued for RCA records nor any inquiry made as to them. When the trial resumed on December 29, it was evident that the matter of tests was not lost upon counsel. After the government had rested its direct case, before the defense went forward, defense counsel stated:

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[40] *See* Rosenberg v. United States, 360 U.S. 367, 371 (1959) (Frankfurter, *J.*); *cf.* United States v. Soblen, 301 F.2d 236, 242 (2d. Cir.), *cert. denied*, 370 U.S. 944 (1962); United States v. Keogh, 316 F. Supp. 921, 930-31 (S.D.N.Y. 1970), *aff'd*, 440 F.2d 737 (2d Cir.), *cert. denied*, 404 U.S. 941 (1971).

[41] At the very latest, the grand jury testimony was delivered to the defense upon the conclusion of Kick's direct testimony. However, it is likely that defense had this earlier. The Assistant United States Attorney noted that from time to time during the presentation of the government's case he had turned over to the defense the § 3500 material, including Kick's grand jury testimony. (Stenographer's Minutes, Dec. 29, 1969, at 400-01.) However, it is not altogether clear whether this occurred at the start of the trial or how long before Kick took the witness stand.

Appendix C

"If the government has in its possession any tests made by the RCA Company of the 2N 1225s I would appreciate that I be furnished with those tests if they indicate that the parts are in fact RCA parts.

"The record is not completely clear as to whether tests were in fact made—physical tests. *There seems to be an indication from Mr. Kick that they were.* If the government has them, I would appreciate having them. If not, I would accept the representation of Mr. Sullivan.

. . . .

"Mr. Sullivan: Mr. Kick testified, I believe, that there was no way of telling whether or not that was an RCA part. If it was an RCA part, it hasn't been made in three years. And that is the best evidence the government has, also.

"The Court: What is your answer to that?

"Mr. Ward: I didn't think the record was clear at this point. . . ." [42]

With the record "not completely clear" as to whether tests were in fact made, as counsel put it, with the grand jury minutes in its possession referring to RCA tests,[42] the trial continued for another two days without the slightest attempt to clear the matter by subpoenaing RCA records or recalling Kick for clarification or further information. Thus, it is beyond challenge that during a period of at least five days during the trial the defense

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[42] 382A-383A. (emphasis added)

[42] The suggestion that the reference to such tests might have been lost amid the mass of material handed over at trial is disposed of by the fact that trial counsel did recognize the indication that some tests had been performed.

knew that some tests were performed and further information was readily producible if deemed of significance. The defense cannot claim ignorance of material matters in its possession. It was there; it was available; it was simply not availed of.[44] Under the circumstances it cannot be said that the test of due diligence has been met.

As noted, appellate counsel was substituted on June 18, 1970. On October 9, 1970, appellant's brief was filed, and after argument the conviction was affirmed on June 1, 1971. Six days later counsel made a request of RCA, which readily responded and made available the reports which now ground this motion as newly discovered evidence. Appellate counsel, in support of this motion, stated: "After we had completed our briefs, I became convinced beyond a moral certainty that Munchak was not guilty."[45] This view, it is further stated, was deepened by the circumstance that as to counts 1 and 2, which the court had dismissed, there was extensive evidence that the manufacture of the transistors there at issue (JAN CGO 2N 1722) could not be determined by looking only at the brand, but that electronic tests would have to be run and the transistors cut open and the internal works examined.[46] Thus, appellate counsel also was alerted no later, according to their own statement, than October 9, 1970, the date of filing briefs, to the purported significance of tests now claimed to require a new trial. Yet, no step was taken to ascertain the existence of this evidence, so easily available to appellate counsel as subsequent events demonstrated,

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[44] *Cf.* United States v. Passero, 290 F.2d 238, 245 (2d Cir.), *cert. denied*, 368 U.S. 819 (1961).

[45] Costikyan affidavit at ¶10.

[46] Costikyan affidavit at ¶11.

for a period of eight months, not until the conviction was affirmed. The pending appeal did not dispense with the duty of due diligence. Nor would it have foreclosed consideration of a motion for a new trial on the ground of newly discovered evidence.[47] Under all the circumstances, again it cannot be said that the requirement of due diligence has been met.

The motion for a new trial is denied.

Dated: New York, N.Y.
February 28, 1972

EDWARD WEINFELD
United States District Judge

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[47] *See* Brown v. United States, 411 F.2d 716 (D.C. Cir. 1969) (per curiam); United States v. Comulada, 340 F.2d 449, 452 (2d Cir.), *cert. denied*, 380 U.S. 978 (1965); United States v. Smith, 331 F.2d 145 (6th Cir. 1964) (2 cases); United States v. Minkoff, 181 F.2d 538 (2d Cir. 1950) (per curiam); Rakes v. United States, 163 F.2d 771 (4th Cir. 1947) (per curiam); 2 C. Wright, Federal Practice and Procedure § 557, at 534-35 (1969).